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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner,*

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY OF PETITIONER TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AND TO BRIEF FOR RESPONDENTS IN OPPOSITION

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1. The basic issue is now sharply focused. Where, as here, a political subdivision is bound, financially and operationally, by detailed, explicit, terms of a Trust Agreement, judicially enforceable by a private party, and where the subdivision cannot without that party's consent remove the Trustee, the consulting engineers, or

the management company, who actually conduct the operation, is the enterprise exempt from the National Labor Relations Act because the transaction is labelled a "purchase and sale"?

The Board admits (Memo., p. 19), that Congress could not conceivably have intended the Section 2(2) exemption to apply to an "essentially private operation." It contends, however, that it is enough to transform a private operation into a public one to label the transfer a "purchase and sale." But determination whether a transaction is a "purchase and sale" does not answer the question whether the operation is, in essence, public or private. That depends on whether "ultimate control" of the operation is actually in public or in private hands, not merely, as the Board seems to assume, (Memo., p. 20, n. 18), on whether the "seller" retains "a right of reversion."

The Board refuses to look behind the contracting parties' self-serving declarations that Pawley "relinquished full ownership of the Transit System and its assets to the County" (Memo., p. 20, n. 18). Its self-imposed blindness is an open invitation to deals in which private ownership or control is "concealed or camouflaged or obscured by a smokescreen" of Government ownership and operation to "shackle, eliminate or extirpate collective bargaining." *Tate v. Pennsylvania Transportation Co.,* 410 Pa. 490, 497, 498, 190 A. 2d 316, 319, 320.

The Board's insistence that the labels alone tell the story (Memo., pp. 4, 12-13, 20, 24), contrasts sharply with the Florida courts' finding (Pet. A-15) despite the parties explicit disclaimer (Pet. p. 7), Pawley in fact does have substantial "financial and managerial control".

If collective bargaining, at least in public utilities, is to survive the Board must be reminded that the "conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 583." *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 736 (Mr. Justice Douglas, concurring).[1] Wherever such private control as the Florida courts here found exists in fact, federal law must shield the interest of employees in collective bargaining against sham disclaimers and other "legal paraphernalia which inventive genius" (*Helvering* v. *Clifford*, 309 U.S. 331, 334), may construct. Cf. *Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549.

In exempting government as employer under Section 2(2), Congress obviously had in mind only full fledged and unconditional operations by government. Congress re-emphasized this recently in the Urban Mass Transportation Act of 1964, 78 Stat. 302, when it conditioned availability of funds for acquisition of private mass transportation utilities upon preservation of "collective bargaining rights" (Memo., p. 12). If Congress was concerned with preservation of collective bargaining in transportation utilities which government would, upon acquisition, wholly own and control, *a fortiori*, the Section 2(2) exemption cannot be read as sanctioning extirpation of collective bargaining in utilities which government does *not* wholly own and control.

The Board overlooks that the right to strike is denied "traditionally" (Memo., p. 15), only to

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[1] 3 Jones, *Chattel Mortgages and Conditional Sales* (Bowers Ed.), § 965, pp. 70-71; *United States* v. *Silk*, 331 U.S. 704, 713; *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729; *Bartels* v. *Birmingham*, 332 U.S. 126, 128-129.

employees of enterprises which are wholly government owned and operated. *United States* v. *Mine Workers,* 330 U.S. 258, 319-321, 328-329. Only such enterprises have "none of the peculiar characteristics of a private enterprise maintained for purposes of private gain." *Miami Water Works, Local 654* v. *City of Miami,* 157 Fla. 445, 26 So. 2d 194; *Norwalk Teachers Ass'n* v. *Board of Education,* 138 Conn. 269, 83 A. 2d 482; *Nutter* v. *City of Santa Monica,* 74 A.C.A. 331, 168 P. 2d 741. And it is only such enterprises, therefore, which are granted exemption from collective bargaining requirements, because only where the private profit motive is entirely absent can Government consider the welfare of its employees in terms of the public interest alone. The presence of a private profit interest makes it impossible for Government as "employer" to function "*exclusively* for the benefit of the State." (Emphasis added.) *International Longshoremen's Association* v. *Georgia Ports Authority,* 217 Ga. 712, 124 S.E. 2d 733, 735, cert. denied, 370 U.S. 922.

2. The Board's insistence that the Section 2(2) exemption is operative wherever Government has "employer controls" (Memo., pp. 15, 19), invites political subdivisions to circumvent Congress' prohibition of the use of government power to destroy collective bargaining and the right to strike by assuming the ostensible status of "employer" and regulating wages, hours and working conditions through civil service laws. This result cannot be reconciled with *California* v. *Taylor,* 353 U.S. 553, 559-561, 566-567; which explicitly recognizes that restrictions imposed by civil service laws are as antithetical as compulsory arbitration to pro-

tected collective bargaining. (But, Cf. Cox and Seidman, *Federalism and Labor Relations,* 64 Harv. L. Rev. 211, 240-241 (1950)).

The Board's equation of the exemption with the possession of "employer controls" assumes that the term "employer" as used in the Act refers to the legal entity which possesses such controls. Congress had an entirely different idea. In Section 1 of the Act, Congress spoke of "employers" as persons "who are organized in the corporate or other form of ownership association." The "inequality of bargaining power" which Congress moved to redress is inequality between persons *so organized* and employees, for it is that inequality which "tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry." Accordingly, the term "employer" has been construed to refer not to any particular legal entity but to the industrial enterprise in which employees work. "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." *NLRB* v. *Colten,* 105 F. 2d 179, 183 (6th Cir.), followed in *Hoosier Veneer Co.,* 21 NLRB 907, 928-929, 932-933, 935-937, enf'd 120 F. 2d 574, 576, 579 (7th Cir.), cert. denied, 314 U.S. 647.

Therefore, the starting point for inquiry is whether the employing enterprise is covered. The answer must turn on whether *any* of its owning or controlling entities is private. If any one is, the enterprise must be covered, lest Congress' policy "be defeated by the fragmentation of an integrated business into a congeries of entities." *Bowater Steamship Co.* v.

Patterson, 303 F. 2d 369, 373 (2d Cir.), cert. denied, 371 U.S. 680.

The Board's *ipse dixit* to the contrary notwithstanding (Memo., p. 21, n. 19, Br. in Opp. p. 32), the Transit Trust, not Dade County, is the "employing industry," and therefore the "employer" within the meaning of Section 2(2), for the Trust, not Dade County, has "the obligation to bear the financial burden of [employees'] wages and the receipt of the benefits of the hours worked." *Labor Board* v. *Atkins & Co.,* 331 U.S. 398, 414.

In its capacity as trust participant, Dade County is certainly subject to the Board's remedial power under Section 10(a), "to prevent *any person* from engaging in any unfair labor practice." As defined in Section 2(1), and as heretofore applied, the term "person" as used in Section 10 includes government entities. *Hoosier Veneer Co., supra.* The Board's refusal to apply Section 10 to political subdivisions despite *Plumbers Union* v. *County of Door,* 359 U.S. 354 (Memo., p. 23, n. 22; cf. Br. in Opp., pp. 32-33), emphasises the need for intervention by this Court.

The Board's theory that "divestiture" affects only coverage of the enterprise and not of the government qua participant therein (Memo pp. 23-24; Br. in Opp., pp. 31-32) is refuted by the very language the Board quotes. In any event, the purported distinction is irrelevant for if the Government's immunity survives in a joint venture, exclusion of the venture itself, as the Board argues, necessarily follows. That is precisely why the law finds it indispensable to impose coverage upon an exempt party in the context of a joint venture with one not exempt. *Burton* v. *Wilmington Parking*

Authority, 365 U.S. 715, 724, and cases cited in our Petition, pp. 22-25.

Moreover, the Board overlooks the reason the divestiture rule *is* "one of the first principles of our system of law" (Pet., p. 22). In a democracy, government immunity may properly extend only to "the sovereign." *Mine Workers* case, *supra*, 330 U.S. at 272. The *sine qua non* of sovereignty is independence of private control.[2] Therefore, in the context of an enterprise or operation in which it submits to judicially enforceable private control, Government cannot claim sovereignty.

The Board's contention that *Mine Workers* shows "that governmental immunity is not automatically lost where the government shares some of the incidents of ownership and control with private interests" (Memo., pp. 22-23; Br. in Opp., pp. 43-44), stands that case on its head. Three of the Justices who composed the five-member majority explicitly pretermitted the administrative regulation the Board quotes (330 U.S. at 288), and the two others pronounced it invalid (330 U.S. at 329). The premise of adjudication was that during seizure the Government had "full title *and* ownership" (Emphasis added), as well as "ultimate control." 330 U.S. at 284-285, 288.

Since Dade County made no investment and assumed no obligation to make any, and since the Trust

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[2] "The power to have the last word in any dispute is just what sovereignty is." Cohen, Morris Raphael, *Reason and Nature* (The Free Press, Glencoe, Ill., 1953 ed.), p. 397; Holdsworth, W.S., *Some Lessons From Our Legal History* (MacMillan, N.Y., 1928), pp. 122, 143; Cohen, Hymen Ezra, *Recent Theories of Sovereignty* (U. of Chicago Press, 1937), p. 15; Cohen, Morris Raphael, *Reason and Law* (The Free Press, Glencoe, Ill., 1950), p. 115; Bliss, *Sovereignty* (Little, Brown & Co., Boston, 1885), p. 7.

will not terminate unless and until the County has paid the full purchase price of the assets in cash, the transit operation obviously is not now being conducted for "the account * * * risk or expense" of the County, and the County has no "ultimate control." Thus, the Government "involvement" postulated in *Mine Workers* is entirely absent here. In addition, legislative developments since *Mine Workers* clearly show Congressional disapproval of exemption, even on the premises postulated in that case, where "involvement" is intended to be temporary. (Pet., p. 22). Accordingly, to qualify for exemption now, Government involvement must be both permanent and total.

The theory that Government exercise of "employer controls" is *ipso facto* exempt stems from *Tampa Shipbuilding* (Memo., p. 17), a case decided in 1945, two years before *Mine Workers*. The Board justifies clinging to the *Tampa* approach, despite incompatability with *Mine Workers*, on the theory that the government exemption was merely implied in the Norris-LaGuardia Act whereas in the Wagner Act it is "express" (Memo., p. 23). The short answer is that expression was intended merely to insure that the "traditional" exemption, which is sometimes but by no means always, implied (compare *United States* v. *United Mine Workers*, 330 U.S. 258, 272-274, with *California* v. *Taylor*, 353 U.S. 553, 564-565, and *Pardon* v. *Terminal R. Co.*, 377 U.S. 184, 188-189), would attach. It is inconceivable that Congress intended to enact a different scope of Government immunity in contemporaneous statutes so similarly conceived. Compare *Mine Workers* case, *supra*, 330 U.S. at 274, with *Hearst* case, *supra*, 322 U.S. at 126. See also, Brief for the

United States as Amicus Curiae in *Local Union 189 v. Jewel Tea Company*, No. 240, this Term, pp. 21-22. Explicitness, therefore, establishes no more than the draftsman's preference for clarity.

Moreover, the *Tampa* approach is incompatible with the Board's concession (Memo., p. 19), that immunity should not attach where Government exercises "regulatory controls over an essentially private operation." For, if unfettered control over labor relations establishes the right to immunity, there is no room for inquiry whether the operation, as such, is private or public.

3. The Board concedes (Memo., pp. 15, 19), that Congress could not have intended to exclude employees whose wages are controlled by a private investor. Yet it would exclude employees of the Transit Trust because Pawley's power to veto wage increases which jeopardize his profits gives him indirect rather than direct control over their wages (Memo., p. 13). But if Pawley has *any* "power to determine * * * wages" (*Labor Board* v. *Atkins Co.*, 331 U.S. 398, 413), the form of its exercise is quite irrelevant. The Board's reliance (Memo., pp. 7-8, 15, 19), upon Pawley's cession to the County of control over hiring and firing and details of work performance is entirely misplaced. As this Court said in the *Atkins* case, *supra*, at 413-414:

> "* * * it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of the Act must

be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. . . ."

4. Finally, the Board misconceives the parties' "conventions." It stresses (Memo., p. 4), the language which provides that the bonds are not to be "construed * * * as conveying or mortgaging the Transit System," but it ignores the succeeding clause (Pet. p. 8), which provides that "nothing * * * shall be construed * * * to create any debt against the County." Indisputably, the financial "obligations" of the County and the Transit Authority are all contingent on profits. Absent profits, the County need not even pay "interest." A promise to buy *if* there are sufficient future profits is *not* a purchase "on the installment plan" (Memo., p. 24). A transfer pursuant to such a promise is a trust, not a purchase and sale.

In reality, Pawley's transfer of title and possession to the County marked "no diminution in the value of his estate"; rather, his diversion of a portion of the future income to the County in exchange for the labor relations and tax advantages accruing from sovereign immunity reflects "the procuring of a satisfaction which is procurable only by the expenditure of money or money's worth. The enjoyment of the economic benefit accru[es] to him." *United States* v. *Anderson*, 132 F. 2d 98, 100, 101 (6th Cir.). Therefore, before the transit system has been fully paid for, as a matter of federal law, "it is still his * * *." *Todd* v. *Vestermark*, 145 Cal. App. 2d 374, 377, 302 P. 2d 347, 350.

But even assuming arguendo that the contracting parties' "conventions" made Pawley's position technically "that of a preferred creditor" (Bd. Memo., p. 20), the extent of his retained control would nevertheless leave the enterprise legally his.[3] "The point at which the creditor becomes a principal is that at which he assumes *de facto* control over the conduct of his debtor, whatever the terms of the formal contract with his debtor may be." *Restatement of Agency* (Second), Ch. 1, p. 81.[4] Even if "it was not intended that [Pawley] * * * should control or interfere with the [transit] business otherwise than as a mere creditor [i]t is impossible to consider [the arrangements between the parties] without being convinced that their legitimate effect [is] to enable [Pawley] to control the business." *Poundstone* v. *Hamburger*, 139 Pa. 319, 325, 20 A. 1054, 1055.[5]

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[3] 1 *Thompson on Real Property* (1939 Ed.), Ch. 2, Sec. 40, pp. 35, 36, 37; 1 *Powell on Real Property* (Bender, 1949), pp. 27-29; *Ballantine on Corporations* (1946), pp. 12-13. *Crane on Partnerships* (1935) § 19, pp. 16 ff.

[4] *Pougner* v. *First Natl. Bank*, 141 Ill. 124, 131, 30 N.E. 442, 444; *San Joaquin Light & Power Corp.* v. *Costaloupes*, 96 Cal. App. 322, 334, 274 P. 84, 89; *Hackett* v. *Stanley*, 115 N.Y. 625, 633, 22 N.E. 745, 748; *Spaulding* v. *Stubbings*, 86 Wis. 255, 261-265, 56 N.W. 469, 471-472.

[5] That Pawley may have retained control only to liquidate his investment is irrelevant. *Furnace Run Sawmill & Lumber Co.* v. *Heller Bros.*, 84 Ohio 201, 95 N.E. 771, 772; *Purvis* v. *Butler*, 87 Mich. 248, 252-259, 49 N.W. 564, 567. Nor does limitation of the return above principal to five per cent, and its description as "interest," make Pawley any less an entrepreneur. *Coale* v. *Societe Co-operative*, 21 F. 2d 180, 181 (S.D.N.Y.). Profits of public utilities are universally limited to a percentage of invested capital. See Cohen, Morris Raphael, *Property and Sovereignty*, 13 Cornell L.Q. 8, 13 (1927).

5. The Board's admission (Memo., p. 24) that "the issue is the scope of the statutory exemption for governmental employers" highlights both its importance and the necessity of early resolution by this Court. The claim that coverage is no longer "arguable" because the Board has "now expressed its view" (Memo., p. 25), is incompatible with *Interlake's* holding, 370 U.S. at 185, that even a Board "decision is not the last word," but only "the first." *A fortiori,* a mere expression of "views", arrived at *ex parte,* without notice and without hearing, and not susceptible to judicial review, cannot be the "last word." Indeed, for the Board "to improvise * * * [opinions on questions litigable before it] would appear inconsistent with the basic statutory plan * * *." Brief for the United States as Amicus Curiae in *Local 189* v. *Jewel Tea Company,* No. 240, this Term, p. 76.

The Board is not empowered to usurp this Court's functions. *Board* v. *Hearst Publications,* 322 U.S. 111, 130-131, and cases cited. "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369. Moreover, since the question of construction turns on the intention of Congress, not the Board's expertise, the Board's opinion is entitled to no particular weight. *Plumbers' Union* v. *County of Door,* 359 U.S. 354, 358, n. 10; *Office Employes Union* v. *NLRB,* 353 U.S. 313, 320; *Hotel Employees* v. *Leedom,* 358 U.S. 99; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 18-22; *NLRB* v. *Highland Park Co.,* 341 U.S. 322, 325-326; *NLRB* v. *Coca-Cola Bottling Co.,* 350 U.S. 264, 267-269.

Under *Garmon* and *Interlake* the bar against State power will persist unless and until this Court decides

on the merits against coverage. Opposition to this result is reminiscent of the Board's similar attempt to defeat preemption in *Fairlawn, Garmon* and *Guss.* Brief for the NLRB as Amicus Curiae in Nos. 41, 50, 280, October Term, 1956.

If the Board is in error on the coverage issue, its position amounts to usurpation of "the congressional power of repeal." *Office Employes Union* v. *NLRB,* 353 U.S. 313, 320. For redress of administrative nullification, we must look to this Court. *I.C.C.* v. *Humboldt Steamship Co.,* 224 U.S. 474, 484-485; *Stark* v. *Wickard,* 321 U.S. 288, 310; *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 622-623; *New Jersey* v. *United States,* 168 F. Supp. 324, 334-335 (D. N.J.), aff'd, per curiam, 359 U.S. 27.

CONCLUSION

For the foregoing reasons, in addition to those heretofore set forth, the petition for writ of certiorari should be granted.

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